

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KENDRA ASHLEY BEANS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12353  
Trial Court No. 4SM-14-00090 CR

MEMORANDUM OPINION

No. 6855 — February 5, 2020

Appeal from the District Court, Fourth Judicial District, Saint Mary's, Nathaniel Peters, Judge.

Appearances: Michael Barber, Barber Legal Services, under contract with the Alaska Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer, Senior Judge.\*

Judge MANNHEIMER.

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\* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Early one Saturday morning in July 2014, Kendra Ashley Beans drove through the village of Pilot Station while she was intoxicated. Beans ran into a utility pole, knocking out the electrical power to the entire village.

The Alaska Village Electric Cooperative quickly dispatched three workers to repair the damage and restore power to the village. The three employees worked through the night to replace the utility pole and restore electrical power to the village. Between them, these three employees spent a total of 77 hours — including 56 hours of overtime — repairing the damage and restoring the power.

After Beans pleaded guilty to driving under the influence, the State asked the district court to award restitution to the Electric Cooperative for the expenses it incurred in restoring power to Pilot Station. After hearing evidence regarding the Cooperative's damages, the district court ordered Beans to pay restitution to the Cooperative in the amount of \$11,950.68.

In our first opinion in this case — *Beans v. State*, unpublished, 2018 WL 4030846 (Alaska App. 2018) — we reversed the portion of the restitution award that was attributable to the three employees' 21 hours of normal work, because the Electric Cooperative would have had to pay for these 21 hours of labor even if Beans had not caused any damage to the village's electric power system.

We also directed the district court to reconsider one aspect of the restitution that the court awarded in connection with the three employees' 56 hours of overtime.

The court ordered Beans to compensate the Electric Cooperative for the non-wage costs of this overtime: the additional payroll taxes and employee insurance, plus the three employees' increased accrual of annual leave and other non-wage benefits. But with respect to these "overhead" costs, the Cooperative did not offer exact dollar amounts. Instead, the representative from the Cooperative acknowledged that the calculation of these non-wage costs was based on an estimate: according to the

representative, the Cooperative used a rule of thumb that the indirect cost of an employee in taxes and benefits equaled approximately 210 percent of the direct cost of the employee's labor (*i.e.*, the employee's wages). In its restitution order, the district court used this estimate — 210 percent of wages — to calculate the non-wage costs incurred by the Cooperative.

In our prior decision, we concluded that there were two problems with the district court's calculation of this portion of the restitution award. First, when the court calculated 210 percent of the employees' wages, the court should not have counted the wages that the employees received for their 21 hours of normal work, but only the wages that the employees received for the 56 hours of overtime labor. Second, the record of the proceedings in the district court did not explain whether the 56 overtime hours actually caused the Electric Cooperative to incur increased costs in the form of employee benefits (insurance, accrual of annual leave, and the like), over and above what these benefits would have cost the Cooperative if the three employees had worked only normal hours.

We therefore directed the district court to determine whether any of these "overhead" expenses were attributable to the employees' 56 overtime hours, as opposed to the employees' 21 normal hours.

On remand, the district court held an evidentiary hearing to help resolve these matters. At this hearing, a senior accountant for the Electric Cooperative testified that the three employees received a total of \$2,220 in wages for their hours of overtime. The accountant also testified that, in these circumstances, both the federal government and the State of Alaska allow businesses to claim overhead expenses at the rate of 29.09 percent of the employees' wages.

Using this government-approved percentage, the accountant asked the district court to award restitution in the amount of \$645.80 for the Electric Cooperative's

overhead costs associated with the three employees' overtime hours. (29.09 percent of \$2,220 equals 645.798.)

The accountant further testified that this \$645.80 was actually only a "small portion" of the Electric Cooperative's actual overhead expenses, because the government percentage was based solely on the increased costs to the Cooperative in the form of Social Security, Medicare, and retirement allowances. The government percentage did not include the costs to the Cooperative of the employees' increased accrual of annual leave, the increased cost of insurance, or the *per diem* allowance that the employees received for each day they stayed in St. Mary's.

Based on the accountant's testimony, the district court granted the Cooperative's request for \$645.80 in compensation for the overhead costs related to the three employees' overtime hours.

In this renewed appeal, Beans argues that the district court committed error when it relied on the government-approved rate of 29.09 percent to calculate the Cooperative's overhead costs related to the employees' overtime hours.

Beans argues that this approved percentage only yields an *estimate* of the Cooperative's actual overhead costs, and she contends that it was improper for the district court to award any restitution for this overhead unless and until the Cooperative offered firm proof of its actual costs.

As we have explained in prior cases, the restitution statute does not require a court to reach absolute certainty regarding the amount of a victim's compensable costs or losses. Rather, the statute forbids awards of restitution based on speculation.<sup>1</sup> Thus,

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<sup>1</sup> *Peratrovich v. State*, 903 P.2d 1071, 1078–79 (Alaska App. 1995), citing *Reece v. State*, 881 P.2d 1135, 1138 (Alaska App. 1994), *Noffsinger v. State*, 850 P.2d 647, 650 (Alaska App. 1993), and *Lawrence v. State*, 764 P.2d 318, 322 (Alaska App. 1988).

despite a degree of uncertainty, a court can properly award restitution if the court's assessment of the victim's costs or losses is supported by substantial evidence.<sup>2</sup>

But more importantly, Beans's argument appears to be based on a misunderstanding of the record. The Electric Cooperative's accountant did not testify that the 29.09 percent government rate was an "estimate" of the business's true overhead costs. Rather, the accountant testified that the government percentage was a method of calculating a *portion* of the Cooperative's true overhead costs — the portion attributable to Social Security, Medicare, and retirement allowances.

As the accountant explained, the 29.09 percent government rate did not include other types of overhead costs attributable to the employees' overtime hours: their increased accrual of annual leave, the increased cost of insurance, and the employees' *per diem* allowances. The accountant testified that, when these additional costs were taken into account, restitution at the government-approved rate of 29.09 percent represented only a "small portion" of the Cooperative's true overhead costs.

In other words, the accountant told the district court that, rather than try to calculate these additional overhead costs, the Cooperative had decided to settle for a lesser amount of restitution.

For these reasons, we AFFIRM the district court's restitution award.

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<sup>2</sup> *Ibid.*